No. 99-1702

AUG 24 2000

IN THE

# Supreme Court of the United States

---

TEXAS,

*Petitioner*,

v.

RAYMOND LEVI COBB,

*Respondent*.

---

**On Writ Of Certiorari to the Texas Court of Criminal Appeals**

---

## PETITIONER'S BRIEF

---


JOHN CORNYN
Attorney General of Texas
ANDY TAYLOR
First Assistant Attorney General
GREGORY S. COLEMAN*
Solicitor General
S. KYLE DUNCAN
Assistant Solicitor General
P.O. Box 12548
Austin, Texas 78711-2548
(512) 936-1700

*Counsel for Texas*

*Counsel of Record



WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

## QUESTIONS PRESENTED

### I.

When an accused has been indicted for burglary, does his Sixth Amendment right to counsel attach, under *Maine v. Moulton*, 474 U.S. 159 (1985), and *McNeil v. Wisconsin*, 501 U.S. 171 (1991), to questioning about a factually related murder when his eventual capital murder conviction is not based on the previously charged burglary as a predicate felony?

### II.

May an accused make an effective unilateral waiver of his Sixth Amendment right to counsel under *Michigan v. Jackson*, 475 U.S. 625 (1986), and *Patterson v. Illinois*, 487 U.S. 285 (1988), when his only previous "assertion" of that right to counsel consisted of accepting appointment of counsel following indictment on a different, but related, crime nearly a year and a half earlier?

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED | i |
| TABLE OF AUTHORITIES | vi |
| CITATION OF COURT OF CRIMINAL APPEALS'S OPINION | 1 |
| BASIS FOR JURISDICTION | 1 |
| CONSTITUTIONAL PROVISION INVOLVED | 1 |
| STATEMENT OF THE CASE | 2 |
| SUMMARY OF ARGUMENT | 8 |
| ARGUMENT | 9 |
| I. Cobb's Sixth Amendment right to counsel had not yet attached to the murder charges when Cobb confessed | 9 |
| A. State and Federal courts have developed an amorphous, multifactor exception to the Court's bright-line rule that the Sixth Amendment attaches only to a charged offense | 10 |
| B. The Court's precedents support no exception to the general rule that the Sixth Amendment attaches only to the charged offense. | 14 |
| 1. Neither *Moulton* nor *Brewer* supports an exception to *McNeil*. | 14 |
| 2. The Court's precedents establish a sensible rule of attachment, tempered by a same-elements protective rule | 20 |

TABLE OF CONTENTS—Continued

Page

3. Cobb's right to counsel had not attached to the murder charges when he confessed..... 28

4. Even under a principled application of the closely-related test, Cobb's right to counsel did not attach to the uncharged murders ..... 30

II. Alternatively, *Michigan v. Jackson* does not bar Cobb's waiver of his right to counsel. ..... 31

A. *Jackson* should be overruled because it rested on weak foundations that have been completely eroded by subsequent decisions of the Court. ..... 33

1. From the beginning, *Jackson* was only tenuously linked to the prevention of coercion in police-initiated custodial interrogation ..... 34

2. Subsequent decisions have abandoned *Jackson*'s analytical framework ..... 36

3. As to postindictment interrogatees, *Jackson* is entirely duplicative of the protections afforded by *Edwards*. ..... 38

B. Alternatively, Cobb never made a sufficiently clear and unambiguous invocation of his right to counsel to trigger *Jackson*. ..... 40

1. A *Jackson* assertion should be at least as clear as an *Edwards* assertion. ..... 40



TABLE OF CONTENTS—Continued

Page

2. Cobb's mere acceptance of appointed counsel was not an assertion at all, much less an assertion sufficient to trigger the heightened protections of *Jackson*. ..... 43

3. Cobb failed to invoke *Jackson* and demonstrated that he did not wish the aid of an attorney in dealing with the police .... 45

C. Alternatively, the fifteen-month break in custody between Cobb's burglary arraignment and his murder confession lifted the *Jackson* bar..... 47

CONCLUSION ..... 49

TABLE OF AUTHORITIES

Cases — Page

*Adams v. United States ex rel. McCann*, 317 U.S. 269 (1942) ..... 44
*Arizona v. Roberson*, 486 U.S. 675 (1988) ..... 12, 32
*Blockburger v. United States*, 284 U.S. 299 (1932) ..... 26
*Brewer v. Williams*, 430 U.S. 387 (1977) ..... *passim*
*Cobb v. State*, No. 72,807, 2000 WL 275644 (Tex. Crim. App. Mar. 15, 2000) (en banc) ..... 1, 7
*Commonwealth v. Rainwater*, 681 N.E.2d 1218 (Mass. 1997) ..... 12
*Davis v. United States*, 512 U.S. 452 (1994) ..... *passim*
*Dunkins v. Thigpen*, 854 F.2d 394 (CA11 1988) ... 47
*Edwards v. Arizona*, 451 U.S. 477 (1981) ..... *passim*
*Garcia v. State*, 571 S.W.2d 896 (Tex. Crim. App. 1978) ..... 31
*Genry v. State*, 735 So.2d 186 (Miss. 1999) ..... 42
*Gideon v. Wainwright*, 372 U.S. 335 (1963) ..... 10, 39
*Grady v. Corbin*, 495 U.S. 508 (1990) ..... 22
*Holman v. Kemna*, 212 F.3d 413 (CA8 2000) ..... 47
*In re Pack*, 616 A.2d 1006 (Pa. Super. 1992) ..... 13, 25
*Johnson v. Zerbst*, 304 U.S. 458 (1938) ..... 33, 36
*Kirby v. Illinois*, 406 U.S. 682 (1972) ..... 10, 20, 21, 31
*Kyger v. Carlton*, 146 F.3d 374 (CA6 1998) ..... 47,48
*Maine v. Moulton*, 474 U.S. 159 (1985) ..... *passim*
*Massiah v. United States*, 377 U.S. 201 (1964) ..... *passim*
*McFadden v. Garraghty*, 820 F.2d 654 (CA4 1987) ..... 47
*McNeil v. Wisconsin*, 501 U.S. 171 (1991) ..... *passim*
*Michigan v. Harvey*, 494 U.S. 344 (1990) ..... 32, 40, 46
*Michigan v. Jackson*, 475 U.S. 625 (1986) ..... *passim*
*Minnick v. Mississippi*, 498 U.S. 146 (1990) ..... 32, 44
*Miranda v. Arizona*, 384 U.S. 436 (1966) ..... 32, 39, 41
*Montoya v. Collins*, 955 F.2d 259 (CA5 1992) ..... 42



TABLE OF AUTHORITIES—Continued

Page

*Moran v. Burbine*, 475 U.S. 412 (1986) ..... *passim*
*Patterson v. Illinois*, 487 U.S. 285 (1988) ..... *passim*
*People v. Clankie*, 530 N.E.2d 448 (Ill. 1988) ..... 13, 16, 19
*People v. Anderson*, 521 N.W.2d 538 (Mich. 1994) ..... 42
*Powell v. Alabama*, 287 U.S. 45 (1932) ..... 10
*Skaggs v. Parker*, 27 F.Supp.2d 952 (W.D. Ky. 1998) ..... 42
*Smith v. Illinois*, 469 U.S. 91 (1984) ..... 36, 37
*Smith v. State*, 699 So.2d 629 (Fla. 1997) ..... 42
*Solem v. Stumes*, 465 U.S. 638 (1984) ..... 32
*State v. Frye*, 897 S.W.2d 324 (Tex. Crim. App. 1995) ..... 9
*State v. Carter*, 664 So.2d 367 (La. 1995) ..... 42
*United States v. Arnold*, 106 F.3d 37 (CA3 1997) ..... 9, 13, 25
*United States v. Arrington*, 215 F.3d 855 (CA8 2000) ..... 47
*United States v. Barlow*, 41 F.3d 935 (CA5 1994) ..... 47
*United States v. Bautista*, 145 F.2d 1140 (CA10 1998) ..... 47, 48
*United States v. Cooper*, 949 F.2d 737 (CA5 1991) ..... 13, 30
*United States v. Covarrubias*, 179 F.3d 1219 (CA9 1999) ..... *passim*
*United States v. Dixon*, 509 U.S. 688 (1993) ..... 22, 26
*United States ex rel. Espinoza v. Fairman*, 813 F.2d 117 (CA7 1987) ..... 47
*United States v. Gouveia*, 467 U.S. 180 (1984) ..... *passim*
*United States v. Harrison*, 213 F.3d 1206 (CA9 2000) ..... 46, 47

TABLE OF AUTHORITIES—Continued


| | Page |
|---|---|
| *United States v. Henry*, 447 U.S. 264 (1980) | 35 |
| *United States v. Hines*, 963 F.2d 255 (CA9 1992) | 13, 27, 47 |
| *United States v. Lovasco*, 431 U.S. 782 (1977) | 24, 25 |
| *United States v. Martinez*, 972 F.2d 1100 (CA9 992) | 13, 27 |
| *United States v. Melgar*, 139 F.3d 1005 (CA4 1998) | *passim* |
| *United States v. Mitcheltree*, 940 F.2d 1329 (CA10 1991) | 13, 27 |
| *United States v. Muick*, 167 F.3d 1162 (CA7 1999) | 45, 47 |
| *United States v. Skinner*, 667 F.2d 1306 (CA9 1982) | 47 |
| *United States v. Wade*, 388 U.S. 218 (1967) | 10 |
| *United States v. Williams*, 993 F.2d 451 (CA5 1993) | 13 |
| *Upton v. State*, 853 S.W.2d 548 (Tex. Crim. App. 1993) | 9, 25 |
| *Whittlesey v. State*, 665 A.2d 223 (Md. 1995) | 12, 13, 14, 27 |

Constitutional Provisions

| | |
|---|---|
| U.S. Const. amend VI | 1 |

Other Authorities

| | |
|---|---|
| Sup. Ct. R. 13(1) | 1 |
| 28 U.S.C. §1257(a) | 1 |
| Tex. Code Crim. Proc. art. 26.04(a) | 39 |
| Tex. Penal Code § 30.02(a)(1) | 31 |


## PETITIONER'S BRIEF

The fundamental question presented in this case is whether a criminal defendant, who has had unhampered access to counsel at every stage of a prosecution, may nonetheless choose to confess his guilt in a different, but related, crime. The Texas Court of Criminal Appeals erroneously held that Respondent Raymond Cobb's voluntary confession was taken in violation of his Sixth Amendment right to counsel and improperly reversed his capital murder conviction. The court erred for two independent reasons. First, Cobb's Sixth Amendment right had not yet attached when he confessed to the uncharged murders. Second, even if it had, the Sixth Amendment did not bar Cobb's waiver of his right to counsel (1) because he had not invoked the extraordinary protections of *Michigan v. Jackson*, 475 U.S. 625 (1986), and (2) because *Jackson* should be overruled.

## CITATION OF COURT OF CRIMINAL APPEALS'S OPINION

*Raymond Levi Cobb v. State*, No. 72,807, 2000 WL 275644 (Tex. Crim. App. Mar. 15, 2000).

## BASIS FOR JURISDICTION

The Texas Court of Criminal Appeals decided *Cobb* on March 15, 2000. The State timely petitioned for writ of certiorari on April 21, 2000. SUP. CT. R. 13(1). This Court granted a writ of *certiorari* pursuant to 28 U.S.C. §1257(a) on June 26, 2000. *Texas v. Cobb*, 120 S.Ct. 2716 (2000).

## CONSTITUTIONAL PROVISION INVOLVED

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

U.S. CONST. amend VI.

## STATEMENT OF THE CASE

Early on a Monday morning in 1993, two days after Christmas, Lindsey Owings kissed his sleeping wife, Maggie, and his sleeping sixteen-month-old daughter, Kori Rae, goodbye and left for work. He never saw them again.

In the late morning or early afternoon of December 27, the Owings's neighbor Raymond Cobb burglarized the Owings's home, stealing a VCR, a stereo, some Walt Disney videotapes, and a bottle of tequila. In the course of that burglary, Cobb stabbed Maggie to death and buried her and Kori Rae in a wooded area about a mile from the house. Kori Rae was alive when Cobb buried her, but she soon suffocated in her own grave.

When Mr. Owings arrived home after work, his wife and daughter were gone. Aside from the few missing items, there were no signs of a struggle or foul play. He reported the burglary and the disappearances to the Walker County police. The police searched the surrounding area, canvassed the neighbors, and published fliers with photos of Maggie and Kori Rae, but no trace of them was found.

In February 1994, detectives received an anonymous tip that Cobb had been seen with the stereo stolen from the Owings's home. Cobb initially denied involvement in the burglary, but eventually admitted that he had burglarized the Owings's home. Cobb made a voluntary, written statement to that effect in July 1994, but continued to deny any involvement in the disappearances.

Based on his statement, Cobb was indicted for burglary. In August 1994, the district court appointed an attorney, Hal Ridley, to represent Cobb. Pet., at B-2.[1] Ridley's representation of Cobb was limited, by Ridley's own

[1] Relevant portions of Ridley's suppression hearing testimony are transcribed in an appendix to the petition for writ of certiorari (Pet. B).



admission, to the pending burglary charge. *Id.* Based on his conversation with Walker County District Attorney David Weeks, Ridley understood that Cobb was not yet a suspect in the disappearances, but he knew that the police believed Cobb knew more than he was saying. Pet., at B-3. This was important to Ridley, because Ridley had recently been involved in a capital murder trial and "really didn't want to get involved in another one right behind that, if Mr. Cobb was in fact a suspect." *Id.*

For the next fourteen months, detectives continued to investigate the disappearances. On two occasions, the detectives asked Ridley for permission to question Cobb about the disappearances. The first of these occasions was at Cobb's arraignment for burglary, shortly after Ridley was appointed. Pet., at B-5. When asked for permission to talk to Cobb, Ridley stated, "I gave my permission and told them that it wasn't necessary for me to be there." *Id.* The second occasion was in September 1995, when Ridley again gave his permission for Cobb to be interrogated about the disappearances outside Ridley's presence. *Id.*, at B-5 to B-6.[2]

Some time after Cobb was released on bond, he moved to Odessa, Texas, where his father, Charles, lived. On November 11, 1995, Charles telephoned Walker County detective Judy James, the lead investigator on the case, and told her that Raymond had confessed to killing Maggie and Kori Rae. James advised Charles to make a statement to the Odessa police, and he did. The Odessa police faxed Charles's statement to James and she used it to obtain an arrest warrant for Raymond, which she then faxed back to Odessa. *See* R.17.147-48; 19.451-53.

[2] On the second occasion, Cobb led investigators through a wooded area near the Owings's residence, retracing his steps during the burglary. A subsequent search of the area with cadaver dogs uncovered no evidence, however.

By then, Odessa detectives Vic Sikes and Harold Thomas had already ascertained Cobb's whereabouts. On the morning of November 12, the detectives arrested Cobb, Mirandized him, and brought him to the police station. They telephoned James and informed her that they had Cobb in custody. When they asked her if they could question him, James agreed. The detectives were not aware that Cobb was represented by an attorney on the previous burglary charge. R.17.148-51,196.

Detectives Sikes and Thomas brought Cobb to an interview room and Mirandized him again. Beginning around 3 a.m., Sikes questioned Cobb for approximately an hour, without success. Cobb never indicated that he was tired and in fact told the officers that "he usually slept during the day and stayed up most of the night." R.2.366. After a five-minute break, Thomas took over questioning. Ascertaining that Cobb was a churchgoer, Thomas spoke to Cobb about his faith. This approach worked, and Cobb soon confessed to the murders. R.17.149-61. Both orally and thereafter in writing, Cobb explained that on December 27, 1993, he had entered the Owings's home and begun removing the stereo. When Maggie Owings confronted him, Cobb stabbed her in the stomach with a double-edged knife he was carrying. Cobb then dragged her body to a wooded area several hundred yards from the house. He described the ensuing events:

> "I went back to her house and I saw the baby laying in its bed. I took the baby out there and it was sleeping the whole time. I laid the baby on the ground four or five feet away from its mother. I went back to my house and got a flat edge shovel. That's all I could find. Then I went back over to where they were and started digging a hole between them. After I got the hole dug the baby was awake. It started going toward its mom and it fell in the hole. I put the lady in the hole and I covered them up. I remember stabbing a different knife I had in the ground where they were. I was crying right then." *See* R.18.230-32; State Exh. 20.



Afterwards, Cobb returned to the Owings's house and completed his theft of the stereo, VCR, videotapes, and the bottle of tequila. Cobb stated that he had been drinking beer and tequila and smoking marijuana that day and "had a pretty good buzz." R.18.232.

Cobb confessed just after 5 a.m. on the morning of November 12, 1995. He said that he thought he still had the murder weapon and consented to a search of his home in Odessa, accompanying Sikes and Thomas there around 6 a.m. Cobb was unable to find the knife, but the detectives did seize nearly twenty other knives and swords, local newspaper articles about the disappearances that Cobb had kept since 1993, and several Walt Disney video tapes. R.2.373. Cobb also retrieved a gold ring that he gave to the officers, saying, "This is the wedding band that I took off Margaret Owings when I killed her." R.17.166-67.

Around 9 a.m., Cobb was arraigned on capital murder charges in Odessa. Cobb was then flown, with Thomas and Sikes, to Walker County, where they were met by Walker County investigators and a justice of the peace. Cobb was arraigned again at the airport and told the arraigning judge that "he just couldn't live with this any more." R.2.236. He was then taken to the Owings's residence, where he led the police to the wooded area where he had buried Maggie and Kori Rae. As crime technicians began to secure the grave, Cobb was taken to jail and booked. Not once—from the time Cobb was arrested through the time he showed police the burial site—did he ever indicate that he wanted to speak to an attorney or that he was represented by an attorney on the burglary charge. *See* R.18.287-89.

That evening, just near dark, the crime technicians found clothing and bone fragments that were later determined to

belong to Maggie Owings. They found Kori Rae's clothing, but no sign of her body. Later that evening, Walker County District Attorney Weeks telephoned Hal Ridley, Cobb's attorney for the burglary charge, and told him what had transpired. Pet., at B-9.

Ridley met with Cobb in jail the next day. While there, Ridley talked with the Walker County investigators. Regarding that conversation, Ridley testified:

> "In fact [Walker County detective] Judy [James] asked me if I was going to be representing him. I told her I didn't know. I was his lawyer for the burglary case; that, you know, that decision hadn't been made to my knowledge yet, but we talked a little bit." Pet., at B-10.

Either that evening or the following evening, investigators contacted Ridley and asked permission to bring Cobb back to the grave site.[3] The crime technicians had been unable to find any sign of Kori Rae's body and hoped that Cobb could provide assistance. Ridley agreed to let Cobb help, but Cobb was unable to lead the investigators to the girl's remains.[4]

On the evening of the 14th, Ridley was summoned to jail to help Cobb cope with "emotional problems" and shortly thereafter Ridley was appointed to represent Cobb on the murder charges:

---

[3] The suppression hearing testimony of Ridley and James seems inconsistent regarding the date that Cobb was brought back to the grave site after being booked. James testified that this occurred on the evening of November 13, R. 2.246-47, but Ridley seemed to testify that it occurred on the evening of November 14, Pet., at B-10. The inconsistency appears entirely inadvertent and, in any event, the date is irrelevant since it is undisputed that Ridley consented to the officers' request to bring Cobb back out to the grave. Pet., at B-10 to B-11.

[4] Expert testimony during trial established the likelihood that Kori Rae's body was either entirely consumed by scavengers or that her immature bones simply disintegrated in the decomposition process. R.19.404-05.



> "A: . . . And ultimately, I was appointed to represent him, and after that I pretty much—well, after that I pretty much cut off the (sic) any more contact that he had with law enforcement.
>
> Q: To the best of your knowledge he has not had any further contact?
>
> A: Shouldn't have had after the 14th. If he did, it was without my permission." Pet., at B-11.

Before Cobb's capital murder trial began, the defense moved to suppress his confession as having been obtained in violation of, *inter alia*, the Sixth Amendment. After a hearing, the trial court denied the motion to suppress. *See* Pet. D. The jury found Cobb guilty of capital murder and Cobb was assessed the death penalty. *See* Pet., at E-7; Pet. F.

In a 6-3 decision, the Texas Court of Criminal Appeals reversed Cobb's conviction and remanded for a new trial. *See Cobb v. State*, No. 72,807, 2000 WL 275644 (Tex. Crim. App. Mar. 15, 2000) (en banc) (Pet. A). The court found that Cobb's Sixth Amendment right to counsel, which had attached when Cobb was indicted for burglary, also attached to the murder investigation because the two offenses were "factually interwoven." Pet., at A-7. The court also determined that Cobb had "asserted" his Sixth Amendment right to counsel "by accepting Ridley's appointment as his counsel." *Id.* These facts, the court reasoned, implicated the prophylactic rule of *Michigan v. Jackson*, 475 U.S. 625 (1986), and barred Cobb's unilateral waiver of his right to counsel during the November 12, 1995 interrogation. In vigorous dissent, Judges McCormick, Keller, and Keasler would have found that: (1) *Michigan v. Jackson* did not apply to these facts and that Cobb had validly waived his Sixth Amendment right to counsel under *Brewer v. Williams*, 430 U.S. 387 (1977), and made a voluntary confession, and (2) in any event, under *McNeil v. Wisconsin*, 501 U.S. 171 (1991),

Cobb's Sixth Amendment right to counsel had not attached with regard to the capital murder offense at the time he confessed. Pet., at A-25 & n.20.

## SUMMARY OF ARGUMENT

Cobb's murder confession was properly admissible because he made a voluntary, intelligent, and knowing waiver of his right to counsel before confessing. The Sixth Amendment did not bar Cobb's confession because:

- The Sixth Amendment right to counsel had not attached to the murder charges when Cobb confessed. It had attached only to the burglary for which Cobb had been indicted over a year earlier. The Sixth Amendment's protections are offense specific and therefore did not bar Cobb's confession to the separate, uncharged murders.
- Alternatively, Cobb validly waived his right to counsel. *Michigan v. Jackson* rested on weak premises and was ill-fitted to the Sixth Amendment context. Subsequent decisions have abandoned *Jackson*'s analytical framework. *Jackson*'s promised safeguards against police coercion are superfluous because they duplicate the protections afforded by *Edwards v. Arizona* in the Fifth Amendment context. *Jackson* is a dead letter and should be overruled.
- Even if *Jackson* is still good law, Cobb never triggered *Jackson* by invoking his right to counsel. Cobb's mere acceptance of appointed counsel on the burglary charge was not a sufficiently clear and unambiguous assertion that Cobb desired the buffer of counsel during future custodial interrogation. Cobb never objected to this questioning and never invoked his right to counsel. *Jackson* therefore did not bar his waiver.
- Even if Cobb invoked his right to counsel and triggered *Jackson*, Cobb was free from police custody for fifteen months before he confessed to the murders. This lengthy break in custody, during which Cobb consulted with counsel, eliminated the inherently compelling pressures of continued custody and dissolved the *Jackson* bar.



## ARGUMENT

### I. COBB'S SIXTH AMENDMENT RIGHT TO COUNSEL HAD NOT YET ATTACHED TO THE MURDER CHARGES WHEN COBB CONFESSED.

The Court may resolve this case on the basis that Cobb was not entitled to the benefits of the Sixth Amendment right to counsel at the time he confessed to the murders. The Texas Court of Criminal Appeals reasoned that, when Cobb was indicted for burglary, his Sixth Amendment right to counsel also automatically attached to the capital murder offense because it was "factually interwoven with the burglary." Pet., at A-7. The court relied on the purported rule that "once the right to counsel attaches to the offense charged, it also attaches to any other offense that is very closely related factually to the offense charged." Pet., at A-6 (citing *State v. Frye*, 897 S.W.2d 324, 328-29 (Tex. Crim. App. 1995); *Upton v. State*, 853 S.W.2d 548, 555-56 (Tex. Crim. App. 1993); *United States v. Arnold*, 106 F.3d 37, 41 (CA3 1997)).

The court erred by expansively applying an "exception" to the general rule of Sixth Amendment attachment that (1) is based on a misreading of the Court's precedents, and (2) disrupts the balance the Court has already struck between a criminal defendant's right to the assistance of counsel as to a charged offense and the government's interest in investigating additional, uncharged criminal activity.

### A. State and Federal Courts Have Developed an Amorphous, Multifactor Exception to the Court's Bright-Line Rule that the Sixth Amendment Attaches Only to a Charged Offense.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI. This guarantee applies to the states via the due process clause of the Fourteenth Amendment. *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932). Due process also requires that state courts appoint counsel for criminal defendants who cannot afford it. *Gideon v. Wainwright*, 372 U.S. 335, 343-45 (1963).

A criminal defendant's Sixth Amendment right to counsel arises in advance of his actual trial. It attaches upon the "initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Kirby v. Illinois*, 406 U.S. 682, 689 (1972). The right, however, protects defendants only at postattachment proceedings deemed "critical" because their "results might well settle the accused's fate and reduce the trial to a mere formality." *See United States v. Wade*, 388 U.S. 218, 224 (1967); *see also United States v. Gouveia*, 467 U.S. 180, 189 (1984). Postattachment police interrogation is considered a critical stage at which an accused is entitled to the assistance of counsel. *See, e.g., Brewer v. Williams*, 430 U.S. 387, 400-01 (1977); *Massiah v. United States*, 377 U.S. 201, 206 (1964).

Attachment of the Sixth Amendment right to counsel grants a defendant certain heightened protections. Following attachment, if a defendant "asserts" his right to counsel at an arraignment or similar proceeding, the police may not thereafter approach the defendant outside the presence of counsel and secure a waiver of his right to counsel. Any such



waiver, even if valid under ordinary standards, will be presumed invalid. *Michigan v. Jackson*, 475 U.S. 625, 636 (1986).

The Sixth Amendment right to counsel, as well as the *Jackson* fence around it, are offense specific. *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991). This is so because the right itself springs into existence only when the government initiates a criminal prosecution for a particular offense. *Id.* Thus the protection afforded by the right to counsel, by definition, only covers the substance of the "formal charge, preliminary hearing, indictment, information, or arraignment" that heralds, and limits, a criminal prosecution. *Id.* (quoting *Gouveia*, 467 U.S., at 188).

In *Maine v. Moulton*, the Court confirmed this principle and explained some of its consequences:

> "[T]o exclude evidence pertaining to charges as to which the Sixth Amendment right to counsel had not attached–at the time the evidence was obtained, *simply because other charges were pending at that time*, would unnecessarily frustrate the public's interest in the investigation of criminal activities. Consequently, incriminating statements *pertaining to pending charges* are inadmissible at the trial of those charges, notwithstanding the fact that the police were also investigating other crimes, if, in obtaining this evidence, the State violated the Sixth Amendment by knowingly circumventing the accused's right to counsel." 474 U.S. 159, 180 (1985) (emphasis added).

*See id.*, at 179 (police "have an interest in the thorough investigation of crimes for which formal *charges* have already been filed" but "also in investigating new or additional crimes"); *id.*, at 179-80 (Sixth Amendment limits police investigative powers when "seeking evidence pertaining to pending *charges*"); *see also McNeil*, 501 U.S.,

at 179 (stating that *Jackson* precludes subsequent questioning "regarding the *charge at issue*"); *Jackson*, 475 U.S., at 632 (right to counsel triggered "after formal accusation has been made"); *id.*, at 633 (presuming that a defendant "requests a lawyer's services at every critical stage of *the prosecution*") (emphasis added). The charge-limited nature of the Sixth Amendment right to counsel contrasts with the Fifth Amendment's proscription of compelled self-incrimination: the Fifth Amendment is not offense specific, and, once invoked, it forbids questioning as to any offense, whether charged or uncharged. *See McNeil*, 501 U.S., at 177; *Arizona v. Roberson*, 486 U.S. 675, 678 (1988); *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981).

Over the last decade, state and federal courts have improperly divined in two of the Court's precedents—*Brewer* and *Moulton*—an implicit, unstated exception to the bright-line rule that the Sixth Amendment right to counsel attaches only to the charged offense. *See generally United States v. Covarrubias*, 179 F.3d 1219, 1224-25 (CA9 1999); *United States v. Melgar*, 139 F.3d 1005, 1012-13 (CA4 1998); *Commonwealth v. Rainwater*, 681 N.E.2d 1218, 1223-25, 1228 (Mass. 1997). Variously denominated as the "inextricably-intertwined," "closely-related," "very-closely-related," and "extremely-closely-related" exception, courts have generally determined that some degree of factual relatedness between a charged and an uncharged offense will cause the right to counsel to attach to *both* offenses. *See, e.g., Whittlesey v. State*, 665 A.2d 223, 232-26 (Md. 1995) (collecting cases).

A recent Ninth Circuit decision provides a comprehensive—and complex—catalog of the factors undergirding the purported exception:

> "Deciding whether the exception is applicable requires an examination of all of the facts and circumstances relating to the conduct involved, including the identity of the persons involved (including the victim, if any), and the timing, motive, and location of the crimes. No single factor is ordinarily dispositive; nor need all of the factors favor application of the exception in order for the offenses to be deemed inextricably intertwined or closely related—which concepts we, like some of the other circuits, deem to be the same. The greater the commonality of the factors and the more directly linked the conduct involved, the more likely it is that courts will find the exception to be applicable." *Covarrubias*, 179 F.3d, at 1225 (citations omitted).



*Covarrubias* also relied heavily on the "continuing nature" of the two offenses. *Id.*, at 1225-26 ("the continuous course of conduct [of the two offenses] would be controlling"); *see also Arnold*, 106 F.3d, at 41 (looking to "similarities of time, place, person, and conduct" to determine "whether the same acts and factual predicates underlie both the pending and the new charges").

In contrast to the broad approach in *Covarrubias*, other courts have narrowly scrutinized the "conduct" underlying two separate charges to determine whether they are closely related. *See, e.g. United States v. Williams*, 993 F.2d 451, 456 (CA5 1993); *United States v. Cooper*, 949 F.2d 737, 743-44 (CA5 1991); *People v. Clankie*, 530 N.E.2d 448, 452 (Ill. 1988). Several courts have also focused on the degree of police misconduct associated with the tainted interrogation. *See, e.g., United States v. Martinez*, 972 F.2d 1100, 1105-06 (CA9 1992); *United States v. Hines*, 963 F.2d 255, 258 (CA9 1992); *United States v. Mitcheltree*, 940 F.2d 1329, 1339, 1342-43 (CA10 1991). Other courts have inquired "whether the statements elicited by the police constituted evidence of both offenses." *Whittlesey*, 665 A.2d, at 235 (citing *In re Pack*, 616 A.2d 1006, 1011 (Pa. Super. 1992)); *see also Melgar*, 139 F.3d, at 1015 (requiring defendant to show

additionally that "the interrogation on the new offenses produced incriminating evidence as to the previously charged offenses").

### B. The Court's Precedents Support No Exception to the General Rule that the Sixth Amendment Attaches Only to the Charged Offense.

This multiheaded exception springs from a widespread misreading of the Court's decisions in *Brewer* and *Moulton*. Both cases are entirely consistent with *McNeil*'s offense-specific rule and cannot support the open-ended exception widely employed by lower courts. Significantly, a leading case has doubted whether this Court's precedents compel the exception at all. *Whittlesey*, 665 A.2d, at 233 & n.8.

#### 1. Neither *Moulton* Nor *Brewer* Supports An Exception to *McNeil*.

In *Moulton*, the primary source of the so-called exception, Moulton and Colson were indicted on four counts of theft for having "received, retained, or disposed of" three automobiles and assorted auto parts. 474 U.S., at 162. Colson decided to cooperate with the police and confessed that he and Moulton, in addition to the charged thefts, had also broken into a local dealership to steal the auto parts. *Id.*, at 162-63. Colson added that he had received anonymous threats concerning the pending charges and that Moulton had suggested they kill one of the state's witnesses. *Id.* When a tap on Colson's phone conversations with Moulton revealed nothing inculpatory, Colson consented to wear a body wire to a meeting with Moulton. *Id.*, at 163-65. Ostensibly, the wire was intended to protect Colson and gather evidence about Moulton's plan to kill the witness, but the police also admitted that they were "aware that Moulton and Colson were meeting to discuss the charges for which Moulton was under indictment." *Id.*, at 165. The two men met and, as the police expected, engaged in "a prolonged discussion of the pending charges." *Id.*



"[M]uch of the discussion," the Court observed, "involved recounting the crimes" in great detail, largely at Colson's prompting. *Id.* The men even spun a plan to create false alibis for their defense at trial. *Id.*

Based on the new evidence, the state dismissed the pending charges and obtained seven new indictments against Moulton: (#1-#4) for the previous theft charges; (#5) for burglary of the dealership where the auto parts were kept; (#6) for arson of one of the stolen vehicles; and (#7) for three more thefts. *Id.*, at 167. Moulton pleaded guilty to some of these charges, and the trial court dismissed others for improper venue. *Id.* The case then proceeded to a bench trial "on the remaining three indictments, which covered the subjects of the original indictments and charged him with burglary, arson, and theft." *Id.* The state introduced as evidence portions of the surreptitiously recorded meeting with Colson, "principally those [portions] involving direct discussion of *the thefts for which Moulton was originally indicted*." *Id.* (emphasis added). The court acquitted Moulton of arson, but found him guilty of "burglary and theft in connection with the Ford pickup truck, the Chevrolet dump truck, and the Ford automotive parts." *Id.*

The Supreme Judicial Court of Maine reversed Moulton's convictions, finding that use of the recordings at trial violated his right to counsel, because they were made under circumstances where the state knew or should have known that "Moulton would make incriminating statements *regarding crimes as to which charges were already pending*." *Id.*, at 167-68 (emphasis added). This Court agreed. The Court reasoned that the Sixth Amendment imposes on the government "an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel." *Id.*, at 171. The Court characterized the recordings as the fruit of "knowing exploitation by the State of an opportunity to confront the accused without

counsel being present," and concluded that the use at trial of Moulton's incriminating statements violated the Sixth Amendment. *Id.*, at 176.

The final section of the Court's opinion rejected the argument that the incriminating statements should not be suppressed because the police had obtained them in a legitimate effort to uncover evidence of Moulton's alleged plan to murder a witness. *Id.*, at 178. The Court reiterated its statement in *Massiah* that even legitimate police investigations are limited by an accused's Sixth Amendment rights. *Id.*, at 179 (quoting *Massiah*, 377 U.S., at 207). The Court carefully noted, however, that the rule in *Moulton* would exclude only "incriminating statements pertaining to *pending charges* . . . at the trial of those charges" and would not exclude "evidence pertaining to charges as to which the Sixth Amendment had not attached at the time the evidence was obtained." 474 U.S., at 180 (emphasis added); *see also id.*, at 180 n.16 ("Incriminating statements pertaining to other crimes, as to which the Sixth Amendment right has not yet attached, are, of course, admissible at a trial of those charges.").

Contrary to *McNeil*'s plain holding, some courts have mined the closely-related exception from a solitary aspect of *Moulton*: that the Court affirmed the reversal of Moulton's convictions for *both* theft *and* burglary, even though the initial charge was only for theft. *See, e.g., Covarrubias*, 179 F.3d, at 1224; *Melgar*, 139 F.3d, at 1013; *Clankie*, 530 N.E.2d, at 451. From this, courts have reasoned that the Sixth Amendment must also attach to some class of uncharged offenses that are "so closely related" to the charged offense that they "cannot be constitutionally isolated" from the right to counsel for the charged offense. *See Clankie*, 530 N.E.2d, at 451. The courts have distinguished the burglary of the auto parts in *Moulton*—which, they say, "occurred at the same time and place and involved the same victims and



circumstances" as the charged theft—from Moulton's plan to kill the witness, which "was planned at a different time and place, and involved a different victim." *Melgar*, 139 F.3d, at 1013 n.1; *see Covarrubias*, 179 F.3d, at 1224. Finally, the courts have intuited these principles while admitting that *Moulton* never states that the right to counsel attached to the burglary charge, and does not contain a single word about the "relatedness" between the burglary and theft charges. *See Melgar*, 139 F.3d, at 1013 (closely-related exception is recognized "sub silentio" by *Moulton*). In fact, a review of the briefs before the Court in *Moulton* shows that the issue of attachment to the burglary charge was never raised or discussed.

*Moulton* supports no closely-related exception whatsoever. Instead, *Moulton* itself is consistent with and implicitly relies on *McNeil*'s offense-specific definition of the scope of the Sixth Amendment's protection. The lower courts' wholesale adoption of the erroneous closely-related principle (dating back to *dicta* in the Supreme Court of Illinois's 1988 decision in *Clankie*) is the result of two basic errors.

First, the courts have overlooked the fact that a Sixth Amendment violation occurs only when the government improperly obtains evidence pertaining to a pending charge and admits the evidence at trial to prove *that previously charged offense*. *Moulton* itself is replete with proof of this principle. Its opening paragraph posits the issue as whether Moulton's right to counsel was violated "by the *admission at trial* of incriminating statements . . . made by him to his codefendant . . . after indictment and at a meeting of the two to plan defense strategy for *the upcoming trial*." 474 U.S., at 161 (emphasis added). The Court's description of the secretly obtained evidence hammers home its relevance to the *pending theft charges*: the Court noted that Colson recorded "a prolonged discussion of *the pending charges*—what actually had occurred," that the two men "discuss[ed] the

case" and planned their defense strategy for trial, and that "much of their discussion involved recounting the crimes." *Id.*, at 165-66. The Court carefully noted that "[e]ach of these [incriminating] statements was later admitted into evidence against Moulton at trial" and, crucially, that the recorded portions used were "principally those involving direct discussion of *the thefts for which Moulton was originally indicted*." *Id.*, at 166-67 (emphasis added). Finally, in its conclusion, the Court explained that "incriminating statements *pertaining to pending charges* are inadmissible at the trial of *those charges*" if the police violated the defendant's right to counsel in obtaining that evidence. *Id.*, at 180 (emphasis added). The courts could declare that the Sixth Amendment reaches uncharged, related offenses only by ignoring *Moulton*'s consistent linking of the Sixth Amendment violation to the pending charges.

Second, the lower courts have overlooked the fact that Moulton was tried for theft and burglary *in the same proceeding*. *See id.*, at 167 ("Moulton . . . proceeded to trial on the remaining three indictments, which . . . charged him with burglary, arson, and theft."). The illegally obtained statements, which were inadmissible at Moulton's trial on the theft charge, also constituted the key evidence that Moulton had committed the burglary. *See id.*, at 165-66 & n.5. This explains the result in *Moulton*. Moulton's right to counsel was violated because the prosecution introduced the recorded statements at trial to prove the previously charged *theft* offense. But his *burglary* conviction also depended on this impermissible evidence and had to be reversed as well.

*Moulton* does not support an exception to the general rule of Sixth Amendment attachment. Although *Moulton* is plain enough, the Court clarified that proposition in *Moran v. Burbine*, 475 U.S. 412 (1986), which described *Moulton* as having "considered the constitutional implications of a surreptitious investigation that yielded evidence pertaining to



two crimes. For one, the defendant had been indicted; for the other, he had not." *Id.*, at 431. When discussing the "two crimes," *Moran* was referring to the initially charged theft and the as-yet-uncharged murder conspiracy. *See id.* (discussing the "former" crime as one for which defendant "had been indicted" and as relating to the "first charging proceeding"); *id.* (observing that the evidence would be admissible as to the second, unindicted crime); *see also Moulton*, 475 U.S., at 162 (original indictment for theft); *id.*, at 180 & n.16 (discussing unindicted conspiracy to murder). *Moran* said nothing about the burglary charge, nor did it hint that Moulton's Sixth Amendment right to counsel had somehow attached to the burglary. Instead, *Moran* focused on the only two offenses that are relevant in *Moulton*: the charged theft and the uncharged conspiracy. *Moran* strongly reaffirms that *Moulton* erected no "sub silentio" exception to the general bright- line rule of Sixth Amendment attachment.

*Brewer* is even weaker authority for an exception to *McNeil*. Lower courts have found license to mint the exception from the following aspects of *Brewer*: (1) Williams was arrested and arraigned on an abduction charge, based on a witness's testimony that Williams had placed in his car a bundle containing what appeared to be a child missing from the YMCA where Williams resided; (2) the police explicitly agreed with Williams's two attorneys not to interrogate him on the 160-mile car trip back to the police station, but did anyway by piquing Williams's religious sensibilities with the so-called "Christian burial speech," prompting him to lead the officers to the child's body; and (3) the Court ruled that Williams's subsequent trial for first-degree murder based on the illegally obtained evidence violated his right to counsel. 430 U.S., at 390-94, 398-401. Courts have reasoned that *Brewer* must have "implicitly recognized, though without discussion" the principle that the Sixth Amendment attached both to the charged abduction and the subsequently tried murder. *Clankie*, 530 N.E.2d, at 451; *see Covarrubias*, 179

F.3d, at 1224 (abduction and murder in *Brewer* "involv[ed] the same incident and victim"); *Melgar*, 139 F.3d, at 1013 n.1 (right to counsel also attached to "later-charged, closely-related, crime of murder").

*Brewer* does not discuss whether Williams's right to counsel attached to both the abduction and the first-degree murder charges, nor whether the two offenses were related in any factual or legal sense. In fact, *Brewer* was concerned with quite a different matter: whether the government had proven Williams's effective relinquishment of his right to counsel by demonstrating that Williams responded affirmatively to the officer's statements. 430 U.S., at 401-06. As to attachment, however, *Brewer* merely applied the now familiar rule that the Sixth Amendment attaches upon initiation of criminal judicial proceedings. *Id.*, at 398 (citing, *inter alia*, *Kirby*, 406 U.S., at 689). Indeed, the state conceded that Williams's Sixth Amendment right to counsel had attached to the murder charges. *Id.*, at 399.[5]

In sum, neither *Moulton* nor *Brewer* can bear the weight of the closely-related exception that has been attributed to them for over a decade. Consideration of *Moulton* and *Brewer* makes clear that the exception is unwarranted.

### 2. The Court's Precedents Establish a Sensible Rule of Attachment, Tempered by a Same-Elements Protective Rule.

The Court's decisions in *Massiah*, *Moulton*, and *McNeil* support a more balanced rule of Sixth Amendment attachment. Any rule of Sixth Amendment attachment must address two competing interests: the accused's right to the assistance of counsel at critical stages of a particular criminal prosecution, and the government's interest in amassing

[5] As in *Moulton*, the briefs in *Brewer* do not discuss or suggest an exception to the Sixth Amendment's charge-specific nature.



evidence of new or additional crimes the accused has committed or may be planning to commit. *See Moulton*, 474 U.S., at 179-80. The Court's precedents already contain a principled rule that protects both interests—the charged-offense rule suggested by *Massiah* and *Moulton* and confirmed by *McNeil*. Under this straightforward rule, if a defendant has been indicted for an offense and the police elicit evidence from the defendant without securing a valid waiver of the right to counsel, the prosecution violates the Sixth Amendment and may not then introduce that improperly obtained evidence at the trial of the pending charge. The charged-offense rule, and a common-sense corollary described below, answer the concerns the courts have attempted to address through the closely-related exception. Unlike that standardless test, however, the charged-offense test finds substance in the balance the Court has already struck between the accused and the government.

*McNeil* best explicated this principle by linking the scope of the Sixth Amendment protections to the scope of the "adversary judicial proceedings" that trigger attachment of the right itself. *See* 501 U.S., at 175 (citing *Gouveia*, 467 U.S., at 188, and *Kirby*, 406 U.S., at 689). Those Sixth Amendment protections, as *McNeil* confirmed, are therefore offense specific. *Id.* In other words, because the Sixth Amendment protects a defendant's right to counsel in adversary criminal proceedings, it would not be appropriate to extend those protections to crimes for which there is no criminal proceeding. Until the police bring a charge, there is simply no Sixth Amendment right to counsel to protect.

The charged-offense rule flows directly from this principle. The police have an interest in investigating new and additional crimes, even those committed by a defendant currently under indictment. Crucially, *McNeil*'s discussion of offense specificity was directly responsive to the principle recognized by *Massiah* and *Moulton* that the police have a

legitimate interest in investigating uncharged crimes as to which the Sixth Amendment has not yet attached. *Id.*, at 175-76 (citing *Moulton*, 474 U.S., at 179-80; *Moran*, 475 U.S., at 431). The police's investigatory powers, however, are limited by the Sixth Amendment right to counsel. But the protections afforded by the right to counsel are only as broad as the formal criminal prosecution that triggered the right in the first place. Once the right is properly invoked, the government may not improperly interrogate a defendant charged with an offense and then use the fruits of the interrogation to convict him of that charged offense.

This simple rule provides an objective, easily ascertainable protection for the accused and his attorney. They can rely on the substance of the pending charge to delimit the scope of permissible police interrogation outside the presence of counsel and, more importantly, to restrict the uses of any improperly obtained evidence. Fundamentally, of course, this rule simply reaffirms what defense attorneys already know from the Court's precedents: the scope of an accused's Sixth Amendment protection during pretrial interrogation extends only as far as the substance of the charge. *See McNeil*, 501 U.S., at 175-76.

The rule also protects "the other side of the *Miranda* equation: the need for effective law enforcement." *Moran*, 512 U.S., at 461. The police must decide when they may and may not approach an indicted defendant and rely on a waiver of his right to counsel. But when faced with an ongoing investigation into a prospectively undefinable "factual scenario," the police will not be able to foresee what distinct crimes may come to light. After all, the law recognizes that multiple offenses may arise out of the same conduct and be separately prosecuted. *See United States v. Dixon*, 509 U.S. 688, 711-12 (1993) (overruling *Grady v. Corbin*, 495 U.S. 508 (1990)).



During an investigation the police may decide they have enough evidence to indict a defendant for a discrete offense. At that point, the charged-offense rule would prohibit the police from using any information to convict the defendant of the charged offense if that information was obtained pursuant to, for example, an invalid Sixth Amendment waiver. But the police must be free to continue their investigative efforts as to new or additional crimes—even those that unexpectedly arise out of the same "factual predicates" or "course of conduct" as the charged offense. *Moulton*, 474 U.S., at 179-80 & n.16; *Massiah*, 377 U.S., at 207. The police cannot know where their interrogation of a defendant will lead; of course, if they are questioning an indicted defendant outside the presence of counsel, they *will* know that they will not be able to use that information to bolster their case on the pending charge. The rule, therefore, has a built-in deterrent. But it would be unfair (and, moreover, contrary to *Moulton* and *Massiah*) to prohibit the use of statements that incriminate the defendant as to uncharged offenses for which prosecution has not even begun.

Arguments for some form of a closely-related exception overlook a crucial irony: while the police are not omniscient and cannot predict the ins and outs of a particular factual scenario (indeed, an "investigation" would be unnecessary if they could), the accused most certainly can. The accused ordinarily has a perfect knowledge of whether an offense for which he has already been charged is somehow related by "time, place, or conduct" to an offense the police have not yet uncovered. The accused, in short, knows with certainty whether he killed or raped during the burglary or the robbery. And although the accused does not yet have a Sixth Amendment right to counsel as to these inchoate offenses (because they have not yet been discovered and charged), he does have a Fifth Amendment right not to be compelled to incriminate himself, and has in fact been told so in the *Miranda* warnings. Thus, if the accused becomes

uncomfortable with the direction of an interrogation, he can cut off questioning as to *all* subjects and receive the aid of an attorney by saying four simple words that require no knowledge whatsoever of the intricacies of Fifth and Sixth Amendment law: "I want a lawyer." *See Edwards*, 451 U.S., at 484-85.

Any exception to *McNeil*'s offense-specific rule necessarily creates uncertainty about whether crimes under investigation may be factually "related" and could force prosecutors to defensively and irresponsibly bring charges based on mere suspicion. But this Court has roundly rejected the notion that prosecutors are "constitutionally required" to file charges before their investigations are complete, even if they have already marshaled enough evidence to prove guilt beyond a reasonable doubt. *See Gouveia*, 467 U.S., at 192 n.7; *United States v. Lovasco*, 431 U.S. 782, 791, 792-95 (1977). Instead, the Court has accorded prosecutors broad deference over when and whether to bring formal charges, cognizant that the decision to prosecute is "seldom clear-cut" and demands "a necessarily subjective evaluation of the strength of the circumstantial evidence and the credibility of the [suspect's] denial." *Lovasco*, 431 U.S., at 793. Above all, the Court has declined to badger prosecutors into unripe—and futile—prosecutions that would "make obtaining proof of guilt . . . impossible by causing potentially fruitful sources of information to evaporate before they are fully exploited." *Id.*, at 791. These concerns reach their apex when a prosecutor is faced with a case, like this one, "in which a criminal transaction involves more than one . . . illegal act." *Id.*, at 792-93. The law must give the government a fair opportunity to uncover evidence of crime, without the specter of a potential Sixth Amendment violation brooding over every step of a criminal investigation.

Contrary to some statements, the charged-offense rule does not invite police to "circumvent the Sixth Amendment right to counsel merely by charging a defendant with additional



related crimes." *Arnold*, 106 F.3d, at 41 (quoting *In re Pack*, 616 A.2d, at 1011); *see also McNeil*, 501 U.S., at 187-88 (Stevens, J., dissenting) (warning of the danger of the police "fil[ing] charges selectively in order to preserve opportunities for custodial interrogation"). First, these warnings are not validated by practical reality, and their premises are counterintuitive. If the police want to avoid Sixth Amendment pitfalls, they will simply not file any charges at all until they have completed their investigation, rather than charging selectively and later adding related charges. *Gouveia* and *Lovasco* will protect an officer who holds back on all charges—leaving an officer free from Sixth, but not Fifth, Amendment limitations—but there is little or no strategic advantage to selective charging.

Second, even if the police may deliberately circumvent the charged-offense rule by charging "additional related crimes" (assuming that is even possible or likely), a simple corollary to the rule would foreclose such an attempt. Suppose the police indict a defendant for robbery, subject him to custodial interrogation, and, without securing a valid waiver of his asserted right to counsel, obtain incriminating statements. It should be obvious that the police cannot dismiss the robbery indictment, bring an identical robbery indictment, and then use the illegally obtained evidence to convict the defendant. The rule is offense specific, not indictment specific. But it should be equally obvious that the police cannot then bring a felony murder indictment against the defendant and use the *same* robbery evidence to prove the predicate felony. Using the tainted evidence to convict the defendant of felony murder under those circumstances would be the functional equivalent of convicting him of the previously charged robbery. *See, e.g., Upton*, 853 S.W.2d, at 555-56 (illegally obtained evidence as to charged car theft could not be subsequently used to convict defendant of felony murder predicated on robbery of same car).

Properly understood, the felony murder scenario falls within the charged-offense rule itself. Prosecution for greater- and lesser-included offenses would be, for purposes of the rule, prosecution for the same offense because the two share common elements. In other words, the rule prohibits use of illegally obtained evidence, not only to prove the previously charged offense, but also to prove another offense that includes all the elements of the previous charge—*i.e.*, that is the same offense. This corollary would share the parameters of the well known same-elements test used for double jeopardy purposes. *See, e.g., Dixon*, 509 U.S., at 696; *Blockburger v. United States*, 284 U.S. 299, 304 (1932). The same-elements test, of course, applies in the distinct context of double jeopardy and protects different interests than the Sixth Amendment right to counsel. *See, e.g., Dixon*, 509 U.S., at 696 (same-elements test protects against multiple punishment and multiple prosecution for the same "offence" under Fifth Amendment double jeopardy clause). But application of the test, which looks solely to the elements of a particular offense, is appropriate in the offense-specific Sixth Amendment context, because *McNeil* requires the parameters of the right to counsel to be measured by the particular offense charged. *See McNeil*, 501 U.S., at 175-76.

Third, even assuming that the government may devise nefarious ways to circumvent an accused's right to counsel that are not covered by the rule and its corollary—which emphatically has not happened in this case—the Court has already devised a protective rule to counter such practices. The cornerstone principle in *Massiah*, *Brewer*, and *Moulton* was that the government has "an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel." *Moulton*, 474 U.S., at 171. Once a defendant has invoked the Sixth Amendment's protection, the government may not "knowingly exploit" an opportunity to confront an indicted defendant outside counsel's presence, whether by employing



an informant to surreptitiously record conversations with the defendant (*Massiah*; *Moulton*) or by deliberately eliciting responses from a defendant in flagrant breach of an agreement with his attorney not to do so (*Brewer*).

Some courts have found that this knowing-exploitation standard represents an independent check on governmental attempts to circumvent the offense-specific right to counsel. *See, e.g., Whittlesey*, 665 A.2d, at 234-35 (collecting cases); *Hines*, 963 F.2d, at 258; *Martinez*, 972 F.2d, at 1105-06; *Mitcheltree*, 940 F.2d, at 1342. Although this standard is consistent with *Moulton*, *Brewer*, and *Massiah*, it should be noted that allegations of police bad faith have nothing to do with the objective inquiry of whether or not the Sixth Amendment protections have attached to an offense. Evidence that the government has somehow manipulated the order or timing of charges to defeat a defendant's right to counsel should constitute a violation only if the defendant's Sixth Amendment rights have already attached and been invoked. But the extent to which the Sixth Amendment applies to particular offenses cannot expand and contract based on the subjective mental state of the prosecution. *Moulton* makes clear that "the Government's investigative powers are limited by the Sixth Amendment rights of the accused," and not by the good or bad faith of the police or the prosecutor. 474 U.S., at 179-80.

In sum, the Court should not abandon the charged-offense rule derived from its own precedents. Under this rule, once the right to counsel has been invoked, the government may not improperly elicit evidence from a defendant as to a pending charge and then use the evidence at trial to convict the defendant of that charge. Similarly, the police may not use the same evidence to convict the defendant of a subsequent charge that incorporates the previous charge as a lesser-included offense. The government may, however, properly obtain and use evidence relating to a different,

uncharged offense because the Sixth Amendment right to counsel will not have attached to that charge.

### 3. Cobb's Right to Counsel Had Not Attached to the Murder Charges When He Confessed.

Swearing he knew nothing about the disappearances of Maggie and Kori Rae Owings, Cobb confessed in July 1994 to the burglary of their home and was indicted for that offense. Fifteenth months later and 500 miles away, he was arrested based on new information that he had, in fact, murdered the missing mother and daughter. It is uncontested that Cobb made a knowing, voluntary, and intelligent waiver of his right to counsel and confessed to the murders. Based in part on that confession, he was convicted of capital murder for killing two persons in a single transaction. Pet., at C-1, D-4 ¶13, E-2 ¶3. Cobb was not convicted of capital murder based on the predicate felony of burglary; he was initially indicted for that offense also, but the government abandoned that part of the indictment before trial. Pet., at D-4 ¶¶10, 13.

Cobb's Sixth Amendment right to counsel attached to the burglary offense when he was indicted for burglary. Because the Sixth Amendment is offense specific, however, Cobb's right to counsel did not attach at that time to the distinct offense of capital murder for killing two persons in a single transaction. *McNeil*, 501 U.S., at 175. When Cobb later confessed to the murders, he was not entitled to the heightened protections of the Sixth Amendment and was therefore able to validly waive his right to counsel. Cobb was never tried for the previously charged burglary. Nor was he functionally tried for it, because his murder conviction did not depend on the burglary as a predicate felony. In sum, under a charged-offense test derived from the Court's precedents, Cobb's Sixth Amendment rights were not violated when his incriminating statements were admitted at trial to prove his guilt.



To the extent an independent knowing-exploitation standard may be derived from the Court's cases, it has no application here. Ridley had been appointed as counsel for the burglary, but he testified repeatedly that he did not represent Cobb regarding the disappearances. Pet., at B-2 to B-4, B-10. In fact, Ridley told the police on two occasions that there was no need for his presence if the police wanted to question Cobb about the disappearances. Pet., at B-5 to B-6. According to Ridley, Cobb never objected to the questioning. Pet., at B-6. Finally, even after Cobb had confessed to the murders, Ridley told the police that he did not represent Cobb as to those offenses and that he did not know if he would be appointed. Pet., at B-10. These undisputed facts show that the police behaved with the utmost good faith on all the occasions when they questioned Cobb about the murders, including the occasion that led to his voluntary confession.

The police suspected Cobb all along of having some knowledge about the disappearances. As a result of his confession to the burglary, the police had enough evidence to indict him for that offense, but they had no idea what had happened to Maggie and Kori Rae, under what circumstances they had disappeared, or what the extent of Cobb's knowledge about them was. Cobb made sure of that by burying their bodies and denying any knowledge of his foul acts.

This was the undefined and unknowable factual situation that confronted the police when they received information, through Cobb's father, linking Cobb to the murders. Cobb cannot rationally argue that the police somehow manipulated the laying of the separate burglary and murder charges to circumvent Cobb's right to counsel. They did no such thing. Rather, they independently investigated two distinct offenses

that, as it turned out when Cobb revealed the truth, were linked by common circumstances.

### 4. Even Under a Principled Application of the Closely-Related Test, Cobb's Right to Counsel Did Not Attach to the Uncharged Murders.

If the Court adopts some formulation of the closely-related test, it should favor the Fifth Circuit's narrow application in *United States v. Cooper* as the version that best balances the competing concerns of law enforcement and the accused. 949 F.2d 737, 742-44 (CA5 1991); *see supra* Part I.B.2. In *Cooper*, state police suspected Cooper in a convenience store holdup. When an inventory search of his car revealed a sawed-off shotgun, Cooper was arrested, arraigned for aggravated robbery, and appointed counsel. Soon after, a federal agent visited Cooper in jail and obtained a waiver of Cooper's right to counsel without notifying his attorney. Cooper was convicted of the state crime of aggravated robbery and was then indicted for the federal crime of unlawful possession of an unregistered firearm. The federal district court denied Cooper's motion to suppress his statements to the federal agent and he was convicted. *Id.*, at 740-41.

Affirming the district court, the Fifth Circuit held that the state armed robbery charge and the federal weapons charge were not the same for Sixth Amendment purposes. The court declined to apply what it termed the extremely-closely-related rule of *Moulton*, reasoning that "[h]ere, the federal and state crimes concern *different conduct*, although, efficiently for the governments, both prosecutions could use much of the same evidence." *Id.*, at 743-44 (emphasis added).

The Fifth Circuit's narrow focus on conduct represents a principled version of the closely-related test. Determining relatedness based on the specific acts that constitute a



criminal offense provides a more objective and a more reliable guide than the open-ended "time, place, and conduct" tests devised by other circuits. *See, e.g., Covarrubias*, 179 F.3d, at 1225. This conduct-based test may also be easily applied, as this case shows. While the burglary and murders occurred during the same general time and place, the acts constituting those offenses were distinct. Specifically, the burglary consisted of Cobb entering the Owings's home with the intent to commit theft. TEX. PENAL CODE §30.02(a)(1); *see Garcia v. State*, 571 S.W.2d 896, 899 (Tex. Crim. App. 1978) (offense of burglary complete upon entering habitation with intent to commit felony or theft). By contrast, the acts constituting the murder offense were entirely separable: Cobb was convicted of capital murder for having murdered Maggie and Kori Rae during a single episode. Pet., at C-1, D-4 ¶13, E-2 ¶3. The fortuity that Cobb committed the murders close on the heels of the burglary does not obscure the fact that the two offenses were separate for Sixth Amendment purposes.

## II. ALTERNATIVELY, *MICHIGAN V. JACKSON* DOES NOT BAR COBB'S WAIVER OF HIS RIGHT TO COUNSEL.

Even assuming that Cobb's Sixth Amendment right to counsel attached to the capital murder charge at the time he was indicted for burglary, the Court may resolve this case on the alternative basis that the extraordinary postattachment protections of *Michigan v. Jackson*, 474 U.S. 625 (1986), did not presumptively invalidate Cobb's otherwise valid confession. *See* Pet., at A-6 to A-7.

*Jackson* must be understood in light of the Sixth Amendment right to counsel it is said to protect. That right to counsel arises, in advance of trial, upon the initiation of "adversary judicial proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *See Kirby*, 406 U.S., at 689. Thereafter, the right protects the criminal defendant at proceedings deemed

"critical stages," one of which is custodial interrogation. *See Brewer*, 430 U.S., at 400-01.

But there is another "right to counsel," arising not from the Sixth Amendment but from the Court's Fifth Amendment jurisprudence. *See McNeil*, 501 U.S., at 176. Upon request, a suspect undergoing custodial interrogation (whether before or after attachment of the Sixth Amendment) has the right to have counsel present, in order to counteract the "inherently compelling pressures" of such interrogation. *Miranda v. Arizona*, 384 U.S. 436, 467-74 (1966).

In *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981), the Court enacted a prophylactic rule to protect the *Miranda* right to counsel. *See also Solem v. Stumes*, 465 U.S. 638, 644-45 & n.4 (1984) (*Edwards* is a "prophylactic rule, designed to implement pre-existing rights"). *Edwards* holds that, once a suspect has invoked his right to counsel during custodial interrogation, he will not be subject to further questioning "until counsel has been made available to him, unless the accused himself initiates further communications, exchanges, or conversations with the police." *Id.* An *Edwards* invocation must be a clear and unambiguous request for the assistance of an attorney during custodial interrogation. *Davis v. United States*, 512 U.S. 452, 459-60 (1994).

The *Edwards* bar was "designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights." *Minnick v. Mississippi*, 498 U.S. 146, 150 (1990) (quoting *Michigan v. Harvey*, 494 U.S. 344, 350 (1990)). If a suspect makes an *Edwards* invocation, the police may not re-initiate questioning until counsel is present. *Minnick*, 498 U.S., at 153. Moreover, an *Edwards* invocation triggers the following *per se* rule: a suspect's subsequent waiver of his right to counsel—even if voluntary, knowing, and intelligent—will be presumed invalid when obtained by police-initiated interrogation outside the presence of counsel. *Edwards*, 451 U.S., at 484; *see, e.g., Arizona v. Roberson*, 486 U.S. 675, 680-81 (1988); *Solem*, 465 U.S., at 646-47.



Five years later, *Michigan v. Jackson* grafted *Edwards* onto the Sixth Amendment. 475 U.S., at 635-36. The Court accorded to a defendant's "assertion" of his right to counsel "*at an arraignment or similar proceeding*," the *Edwards* effect of barring subsequent police-initiated interrogation outside counsel's presence and, significantly, its effect of presumptively barring otherwise valid waivers of a defendant's right to counsel under such circumstances. *Id.* (emphasis added). *Jackson* thus applied the *Edwards* anti-coercion rule outside the immediate context of custodial interrogation.

### A. *Jackson* Should Be Overruled Because It Rested on Weak Foundations that Have Been Completely Eroded by Subsequent Decisions of the Court.

*Jackson* was based on three distinct premises that were either faulty when the case was decided, are untenable today in light of subsequent precedent, or both.

***One.*** The Court reasoned that the anti-coercion principles underlying *Edwards* applied with even more force to custodial interrogation occurring after a suspect has been formally charged: "the reasons for prohibiting the interrogation of an uncounseled prisoner who has asked for the help of a lawyer are even stronger after he has been formally charged with an offense than before." *Jackson*, 475 U.S., at 631-32.

***Two.*** Relying on its precedents concerning waiver of constitutional rights (especially *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)), the Court believed it was required "to give a broad, rather than a narrow, interpretation to a defendant's request for counsel." *Jackson*, 475 U.S., at 632-33. The Court therefore rejected the petitioner's argument that when an accused requests counsel at arraignment, he "may not have

actually intended [his] request to encompass representation during any further questioning by the police." *Id.*[6]

***Three.*** The core of *Jackson* was its wholesale adoption of *Edwards*'s holding, in the Fifth Amendment context, that categorically bars post-invocation waivers of the right to counsel in response to police-initiated questioning. The Court found "no warrant for a different view under a Sixth Amendment analysis," and therefore concluded:

> "Just as written waivers are insufficient to justify police-initiated interrogations after the request for counsel in a Fifth Amendment analysis, so too they are insufficient to justify police-initiated interrogations after the request for counsel in the Sixth Amendment analysis." 475 U.S., at 635.

### 1. From the Beginning, *Jackson* Was Only Tenuously Linked to the Prevention of Coercion in Police-Initiated Custodial Interrogation.

Refuting *Jackson*'s premises begins with then Justice Rehnquist's dissent (joined by Justices Powell and O'Connor), because subsequent decisions of the Court have adopted and reinforced the dissent's fundamental objections to *Jackson*. The dissenting Justices focused on three weaknesses in the majority's analysis.

First, the *Edwards* prophylactic rule was intended to reinforce only the Fifth Amendment's prohibition on

[6] The *Jackson* majority also rejected the state's argument that the police may not know of the defendant's request for counsel at arraignment. 475 U.S., at 634. The Court reasoned that it must "impute the State's knowledge from one state actor to another." *Id.* It is undisputed that the Odessa police were working with the Walker County police when Cobb was arrested for murder. The fact that the Odessa detectives were unaware of Cobb's representation on the burglary charge is irrelevant to the application of *Jackson*, but highly relevant to the officers' good faith in questioning Cobb. *See supra* Part I.B.3.



compelled self-incrimination. 475 U.S., at 638-40 (Rehnquist, J., dissenting). Applying the *Edwards* anti-coercion rule in the Sixth Amendment context, the dissent explained, "cut[s] the *Edwards* rule loose from its analytical moorings." *Id.*, at 640.

Second, application of the new *Jackson* rule "graphically reveal[ed] the illogic of the Court's position." *Id.* The dissent observed that the *Jackson* bar was triggered by an accused's "assertion" of his right to counsel. *Id.* The dissent pointed out, however, that attachment of the Sixth Amendment right to counsel is not tied to any assertion by a defendant. *Id.*, at 641. By contrast, the Fifth Amendment right arises only when invoked: linking a prophylactic rule to a defendant's assertion, as *Edwards* does, thus makes sense in the Fifth Amendment context. *Id.* But applying *Edwards* to the Sixth Amendment, which does not depend on any assertion, left the *Jackson* majority in an "analytical straitjacket." *Id.*

Third, *Jackson* was viewed as an anomalous extension of the Court's waiver jurisprudence. The dissent observed that the Court had previously erected *per se* barriers against certain police conduct. *See id.*, at 641 n.4 (citing *Maine v. Moulton*, 474 U.S. 159 (1985); *United States v. Henry*, 447 U.S. 264 (1980); *Massiah v. United States*, 377 U.S. 201 (1964)). These were "surreptitious informant" cases, however, in which an accused did not realize he was being questioned by a government agent and therefore had no opportunity to waive his right to counsel. *Id.* It made little sense to extend these precedents to the circumstances of *Jackson*, in which "the conduct of the police was totally open and aboveboard." *Id.*

There was another critical inconsistency in *Jackson* that was not discussed by the dissent. *Jackson*'s second premise was based on a flawed conflation of a defendant's "assertion" and his "waiver" of the right to counsel. *Jackson*, 475 U.S.,

at 632-33 (citing *Zerbst*, 304 U.S., at 464). A defendant's effective or ineffective "assertion" of his right to counsel is in no sense a "waiver" of that right: the two concepts are analytically distinct, and therefore *Zerbst* provides no basis for "broadly" construing a defendant's assertion. *See id.* More concretely, however, this aspect of *Jackson* flatly contradicted the Court's statement two years earlier in *Smith v. Illinois* that "[i]nvocation and waiver [of the right to counsel] are entirely distinct inquiries, and the two must not be blurred by merging them together." 469 U.S. 91, 98 (1984). *Jackson* made precisely that error, and therefore contravened the Court's own precedent.

### 2. Subsequent Decisions Have Abandoned *Jackson*'s Analytical Framework.

The Court effectively discarded *Jackson*'s first premise a mere two terms later in *Patterson v. Illinois*, 487 U.S. 285 (1988). *Jackson* had reasoned that "the reasons for prohibiting the interrogation of an uncounseled accused are *even stronger* after he has been formally charged with an offense than before." 475 U.S., at 631 (emphasis added). But in deciding that *Miranda* warnings supported waiver of both the Sixth and Fifth Amendment rights to counsel, *Patterson* reasoned:

> "The State's decision to take an additional step and commence formal adversarial proceedings against the accused does not substantially increase the value of counsel to the accused at questioning, or expand the limited purpose[7] that an attorney serves when the accused is questioned by authorities. With respect to this inquiry, we do not discern a substantial difference between the usefulness of a lawyer to a suspect during custodial interrogation, and his value to an accused at postindictment questioning." 487 U.S., at 298-99.

[7] An "important basis" for *Patterson* was counsel's "rather unidimensional role" in postindictment questioning: the Court characterized counsel's role as "largely limited to advising his client as to what questions to answer and which ones to decline to answer." 487 U.S., at 294 n.6.



*Patterson* relied on a proposition irreconcilably opposed to *Jackson*'s first premise. A clearer repudiation of *Jackson's* first premise is difficult to imagine. Moreover, as Part II.A.3 *infra* shows, whatever marginal benefit *Jackson* provides at arraignment is entirely duplicative of the protections *Edwards* already affords.

*Jackson*'s second premise—conceptually flawed and contrary to *Smith v. Illinois* from the beginning—was further damaged by *Davis v. United States*, 512 U.S. 452 (1994). *Davis* held that a defendant's assertion of his right to counsel must be sufficiently clear and unambiguous "that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." *Id.*, at 459. An assertion that "fails to meet the requisite level of clarity" fails to trigger *Edwards*. *Id. Davis strictly* construes a defendant's request for counsel, resolving any ambiguity in favor of the police. *See id.*, at 461 (reasoning that a bright line is needed because "it is police officers who must actually decide whether or not they can question a suspect"). *Jackson*, on the other hand, *liberally* construed the same *Edwards* assertion. 475 U.S., at 633. There is no reason to assume that an *Edwards* assertion need be any less clear in the Sixth Amendment context, and *Davis* therefore directly undermines *Jackson*'s second premise.

Finally, *McNeil v. Wisconsin*, 501 U.S. 171 (1991), was the last nail in *Jackson*'s coffin. *McNeil* held that an accused's invocation of his Sixth Amendment right to counsel is not, as a matter of fact or policy, an invocation of his Fifth Amendment right to counsel. 501 U.S., at 177-81. *McNeil* reasoned that defendants invoke their Fifth and Sixth Amendment rights to counsel for distinctly different purposes: (1) the Sixth, to insure postindictment protection

"at critical confrontations with his expert adversary, the government," *id.*, at 177-78; (2) the Fifth, "to protect a quite different interest: a suspect's 'desire to deal with the police only through counsel,'" *id.*, at 178 (quoting *Edwards*, 451 U.S., at 484). Assertion of the Sixth Amendment right (a *Jackson* assertion) was not, as a matter of fact, the assertion of the Fifth Amendment right (an *Edwards* assertion). *Id.* Nor would such a rule be sound policy, because it would effectively render any accused "unapproachable by police officers suspecting them of involvement in other crimes, even though they have never expressed any unwillingness to be questioned." *Id.*, at 180-81. The Court rejected that result as destructive of a paramount pubic interest: "Since the ready ability to obtain uncoerced confessions is not an evil but an unmitigated good, society would be the loser." *Id.*, at 181.

*McNeil* obliterated *Jackson*'s third premise by completely severing the *Jackson* rule from any tie to *Edwards*. After *McNeil*, it is clear that a *Jackson* invocation is factually and legally different from an *Edwards* "wish to have counsel present during custodial interrogation." 501 U.S., at 179. But the reasons for *Edwards*—that the police be prevented from badgering a suspect into waiving his already-invoked right to counsel—were the lifeblood of *Jackson*. *See supra* Part II.A (discussing *Jackson*'s third premise); 475 U.S., at 635. *McNeil* leeched every bit of *Edwards* from *Jackson* and effectively transformed the *Jackson* rule into a dead letter.

### 3. As to Postindictment Interrogatees, *Jackson* Is Entirely Duplicative of the Protections Afforded by *Edwards*.

*McNeil* clarifies that the *Jackson* rule exists today only as a disembodied presumption, riven from its rational underpinnings in *Edwards*. *See* 501 U.S., at 179 (characterizing a *Jackson* assertion as only a "legally presumed . . . request for the assistance of counsel in custodial interrogation"). Practically speaking, though, eliminating *Jackson* from the



Sixth Amendment canon will have no real effect on an accused's ability to counteract the "inherently compelling" pressures of custodial interrogation targeted by *Miranda*. *See* 384 U.S., at 467.

After *McNeil*, *Davis* and *Jackson* cannot peacefully coexist because *Davis* requires an express invocation that is inconsistent with the practical reality of how a criminal defendant receives appointed counsel. At arraignment, for example, an indigent accused will be appointed an attorney because the Sixth Amendment requires it. *See Gideon*, 372 U.S., at 344-45. This will occur whether the accused requests an attorney or not. *See* TEX. CODE CRIM. PROC. art. 26.04(a) (whenever court determines that defendant is indigent, "the court shall appoint one or more practicing attorneys to defend him"). Appointment is thus automatic and the defendant ordinarily will have no reason to invoke the right to counsel. Should a defendant be "foresighted enough, or just plain lucky enough" to make a further, unnecessary request for counsel, then he will be entitled to the putative benefit of *Jackson* under current law. *See* 475 U.S., at 642 (Rehnquist, J., dissenting).

An accused's subsequent confrontation with police interrogators reveals just how illusory and superfluous the benefit of *Jackson* is. When faced with a postarraignment custodial interrogation, the police must read an accused his *Miranda* warnings, which inform him of his right to counsel. 384 U.S., at 489-70. These warnings, of course, are sufficient to support a waiver of either the Fifth or Sixth Amendment rights to counsel, *Patterson*, 487 U.S., at 296, and the Court has held that "the primary protection afforded suspects subject to custodial interrogation is the *Miranda* warnings themselves." *Davis*, 512 U.S., at 460. But an accused who wants the help of counsel in dealing with the pressures of interrogation need only say four words, "I want my lawyer," and *Edwards* will shield him from any further police-initiated

questioning and will presumptively nullify any subsequent waiver of the right to counsel—even if the accused meant to waive it. Given this armory of constitutional and prophylactic rights that are activated by an accused's mouthing four simple words, one might ask: what is the purpose of the additional, dubious protection afforded by *Jackson*? The answer: none.

*Jackson* should be overruled.

### B. Alternatively, Cobb Never Made a Sufficiently Clear and Unambiguous Invocation of His Right to Counsel to Trigger *Jackson*.

If *Jackson* retains any precedential force, the Court should not extend it to the facts of this case. The Texas Court of Criminal Appeals held that Cobb had "asserted" his right to counsel "by accepting Ridley's appointment as his counsel." Pet., at A-7. Nothing in the record discloses that Cobb made any further assertion of his right to counsel under *Jackson*. Cobb's mere acceptance of appointed counsel was not a sufficient "invocation" to trigger *Jackson*.

#### 1. A *Jackson* Assertion Should Be at Least as Clear as an *Edwards* Assertion.

Neither attachment of the Sixth Amendment nor actual representation by an attorney invokes the *Jackson* right. *See Patterson*, 487 U.S., at 291-92; *Harvey*, 494 U.S., at 352. Instead, the *Jackson* rule is triggered by a defendant's "assertion," a prerequisite borrowed directly from *Edwards*. *Jackson*, 475 U.S., at 636; *Patterson*, 487 U.S., at 291. Although the Court has not squarely addressed how clear a *Jackson* assertion must be, it has with an *Edwards* assertion.

In *Davis* the Court held that only a clear and unambiguous request for counsel will trigger *Edwards*. *Davis*, 512 U.S., at 459; *see supra* Part II.A.2. By contrast, if a suspect makes an "ambiguous or equivocal" assertion—*i.e.*, one supporting the



reasonable inference only that the suspect "*might* be invoking the right to counsel"—the police are not barred by *Edwards* from further questioning or from obtaining uncoerced waivers. *Davis*, 512 U.S., at 459 (emphasis added). *Edwards* itself supported this rule of clarity by requiring a suspect to have "clearly asserted his right to counsel." 451 U.S., at 485.

*Davis* strongly invoked "the other side of the *Miranda* equation: the need for effective law enforcement." 512 U.S., at 461. The Court observed that "it is police officers who must actually decide whether or not they can question a suspect." *Id.* Applying *Edwards* only to clear and unambiguous requests for counsel helps the police understand when they may and may not continue questioning and, therefore, protects legitimate efforts to gather evidence of crime. *Id.* A contrary rule would force the police "to make difficult judgment calls about whether the suspect in fact wants a lawyer even though he has not said so, with the threat of suppression if they guess wrong." *Id.*

This need for clear police guidance is equally strong in the *Jackson* context. A *Jackson* invocation has precisely the same effect as an *Edwards* invocation. *Jackson*, 475 U.S., at 635. Without an unequivocally expressed desire to consult counsel, the police face the same uncertainty when deciding whether to question a postindictment or a preindictment defendant. And, of course, the price of guessing wrong is the same in both contexts: the suppression of an otherwise uncoerced confession. *Id.* The Court has never indicated that there should be a different standard of clarity for *Jackson* as opposed to *Edwards* assertions.[8]

Indeed, a *Jackson* assertion should require *greater* clarity than its *Edwards* counterpart. An *Edwards* assertion is made

---

[8] Justice Kennedy has strongly recommended that the Court make consistent its Fifth and Sixth Amendment jurisprudence. *McNeil*, 501 U.S., at 183 (Kennedy, J., concurring).

in the immediate context of custodial interrogation and has a narrowly circumscribed purpose: to cut off questioning and obtain the aid of a lawyer in dealing with custodial interrogation. *McNeil*, 501 U.S., at 178. By contrast, a *Jackson* invocation usually occurs during the relatively open-ended context of, for example, an arraignment or preliminary hearing. A *Jackson* invocation may refer, not only to custodial interrogation, but to any "critical stage" of the prosecution that may follow. *Id.*, at 177-78. Yet *Jackson*, if properly invoked, draws down an iron curtain over all future interrogations with the accused. That far-reaching prohibition should be invoked only by a correspondingly clear and unequivocal assertion.

The Fifth Circuit's decision in *Montoya v. Collins*, 955 F.2d 259 (CA5 1992), provides an appropriate test for determining a sufficient *Jackson* invocation. The Fifth Circuit ruled that a *Jackson* assertion "connotes an actual, positive statement or affirmation of the right to counsel." *Id.*, at 282. The court explained that "[f]or purposes of *Jackson*, an 'assertion' means some kind of positive statement or other action that informs a reasonable person of the defendant's 'desire to deal with the police only through counsel.'" *Id.*, at 283 (quoting *Edwards*, 451 U.S., at 484); *see Genry v. State*, 735 So.2d 186, 195-96 (Miss. 1999); *Smith v. State*, 699 So.2d 629, 638-39 (Fla. 1997); *State v. Carter*, 664 So.2d 367, 370 (La. 1995); *People v. Anderson*, 521 N.W.2d 538, 543-44 (Mich. 1994); *Skaggs v. Parker*, 27 F.Supp.2d 952, 977 (W.D. Ky. 1998) (all adopting *Montoya*).

*Montoya*'s rule comports with the holding in *Davis* that an *Edwards* assertion must be clear and unambiguous. The Court should measure Cobb's mere acceptance of appointed counsel against the requirement that a *Jackson* invocation must "connote[] an actual, positive statement or affirmation of the right to counsel." *Montoya*, 955 F.2d, at 282.



**2. Cobb's Mere Acceptance of Appointed Counsel Was Not an Assertion at All, Much Less an Assertion Sufficient To Trigger the Heightened Protections of *Jackson*.**

Merely accepting appointed counsel should not qualify as an "assertion" at all. The Court has strongly indicated that both *Edwards* and *Jackson* will be triggered only by a defendant's affirmative, clear, and unambiguous statement of his desire for counsel. *See, e.g., Davis*, 512 U.S., at 461 (*Edwards* "must be affirmatively invoked by the suspect"); *McNeil*, 501 U.S., at 175 (*Jackson* operates once the "right to counsel has attached and has been invoked"); *Patterson*, 487 U.S., at 291 (*Jackson* turned on the fact that the accused "had asked for the help of a lawyer"); *Jackson*, 475 U.S., at 636 (both *Edwards* and *Jackson* grounded on the defendant's "assertion of the right to counsel"); *Edwards*, 451 U.S., at 485 (barring reinterrogation if suspect "has clearly asserted the right to counsel"). Indeed, if something other than a defendant's statement may trigger the prophylactic bar, then *Davis* was entirely unnecessary. The record here is devoid of any statement by Cobb asserting his desire for counsel's assistance. The Court of Criminal Appeals therefore erred in applying *Jackson*.

Even if a defendant's behavior in accepting counsel may be regarded as "assertive," it is not the kind of clear and unambiguous assertion that triggers *Jackson* and *Edwards*. Hypothetically, of course, an accused who accepts counsel may be breathing a sigh of relief that he now has counsel to shield him from the vast machinery of the prosecutor. Conversely, an accused who has "accepted" counsel may well regard that counsel as completely unnecessary in one important instance: where the accused plans to confess his crime, whether from remorse or from a desire to obtain favorable treatment in a plea bargain. But even if it is *likely* that an accused who accepts counsel believes that he will thenceforth be shielded from any sort of police questioning,

this Court has clearly stated that "the likelihood that a suspect would wish counsel to be present is not the test for the applicability of *Edwards*." *McNeil*, 501 U.S., at 178. Nor should it be for *Jackson*.

Mere acceptance of counsel falls far short of the clarity demanded by *Davis*, and consequently by *Jackson*. If *Jackson* requires anything less than the "clear assertion" demanded by *Edwards*, then *Jackson* has no meaning in the Sixth Amendment context. Because counsel must be appointed to every indigent accused, the attachment of the Sixth Amendment itself will invariably activate the harsh *Jackson* prohibitions. That rule would be "a thinly disguised constitutional policy of minimizing or entirely prohibiting the use of evidence of voluntary out-of-court admissions and confessions made by the accused." *Massiah*, 377 U.S., at 209 (White, J., dissenting). But the law should "rejoice at an honest confession." *Minnick*, 498 U.S., at 167 (Scalia, J., dissenting). The Sixth Amendment should not be read to invalidate a confession by a defendant who has never declared an intention to deal with the police only through counsel and who has voluntarily waived the right to counsel before confessing. The paternalistic rule of law that would prevent that laudable act "imprison[s] a man in his privileges and call[s] it the Constitution." *Adams v. United States ex rel. McCann*, 317 U.S. 269, 280 (1942).

An accused subject to postindictment questioning may enjoy the ample protections of *Jackson* by a simple, clear, and unequivocal request for the assistance of counsel in dealing with police interrogation. Linking *Jackson*'s pervasive rule to an accused's mere acceptance of appointed counsel, however, will unfairly cripple the police's legitimate efforts to obtain uncoerced confessions. Because Cobb merely accepted appointed counsel when arraigned for burglary, *Jackson* did not bar his subsequent confession to murder.



### 3. Cobb Failed to Invoke *Jackson* and Demonstrated that He Did Not Wish the Aid of an Attorney in Dealing with the Police.

The undisputed record in this case shows that neither Cobb nor his attorney, Ridley, ever objected to the police questioning Cobb outside Ridley's presence about the disappearances of Maggie and Kori Rae Owings. In fact, Ridley's uncontradicted testimony at the suppression hearing was that he "cut off any more contact [Cobb] had with law enforcement" only on November 14, 1995, two days after Cobb had already confessed to the murders. Pet., at B-11. Even assuming that Ridley could have "asserted" Cobb's right to counsel for him,[9] he did so only after Cobb had already confessed. Pet., at B-11.

It was undisputed that Ridley represented Cobb in connection with the burglary charge, beginning in August of 1994, and that the Walker County investigators knew this. Pet., at B-1 to B-4. The Court of Criminal Appeals placed great weight on the fact of Cobb's actual representation by Ridley and on the fact that, on two occasions before Cobb confessed to the murders, Walker County investigators had asked Ridley's "permission" to speak to Cobb about the disappearances. Pet., at A-4 to A-5, A-7. Yet the court ignored Ridley's responses to those police requests. Ridley acknowledged in his testimony that he consistently indicated to the police (1) that there was no reason for him to be present

---

[9] It is far from clear that an attorney can assert the Sixth or Fifth Amendment rights to counsel on his client's behalf. *See, e.g., Moran*, 475 U.S., at 433 n.4 (noting the "elemental and established proposition that the privilege against compulsory self-incrimination is, by hypothesis, a personal one that can only be invoked by the individual whose testimony is being compelled"); *United States v. Muick*, 167 F.3d 1162, 1165-66 (CA7 1999) (interpreting *Moran* as "holding that only the accused may invoke the *Miranda* right to counsel"). The Court need not resolve that question in this case.

when they questioned Cobb about the disappearances, (2) that, if Cobb himself did not object to the questioning, Ridley also had no objection to it, and (3) that Ridley did not even represent Cobb with respect to any possible criminal investigation that arose out of the disappearances. *See* Pet., at B-3, B-5 to B-6, B-10 to B-11.[10] The undisputed facts thus confirm that Cobb's Sixth Amendment right to counsel was never violated or even in danger of being violated.

Of course, Cobb's actual, on-going representation by Ridley could not have triggered *Jackson*. That would flatly contradict the Court's statement that "nothing in the Sixth Amendment prevents a suspect charged with a crime *and represented by counsel* from voluntarily choosing, on his own, to speak with police in the absence of an attorney." *Harvey*, 494 U.S., at 352 (emphasis added). Indeed, the formation of the attorney-client relationship cannot trigger attachment of the Sixth Amendment itself, much less the heightened, prophylactic protections of *Jackson*. *See Moran*, 475 U.S., at 430 ("[T]he suggestion that the existence of an attorney-client relationship itself triggers the protections of the Sixth Amendment misconceives the underlying purpose of the right to counsel.").[11] Thus, Cobb's actual

[10] Ridley tried to qualify his permission by testifying that he gave it "believing [Cobb] wasn't a suspect." Pet., at B-6. At the same time, however, Ridley admitted that the police "always said they thought [Cobb] knew more than he was saying." Pet., at B-7. Ridley never explained what difference, if any, exists between the police suspecting Cobb of "knowing more than he was saying" about the disappearances and considering him a "suspect" in the disappearances. Importantly, however, Ridley was never misled by the police regarding their suspicions of Cobb's involvement in the disappearances, and Ridley himself declined to testify that he had been misled. *See* Pet., at B-6.

[11] These principles illustrate why the Ninth Circuit's recent decision in *United States v. Harrison*, 213 F.3d 1206 (CA9 2000), is in error. *Harrison* holds that a defendant may anticipatorily invoke his Sixth Amendment right to counsel by obtaining counsel on an on-going basis, with the government's knowledge, as to the eventual offenses for which he is charged. *Id.*, at 1213. *Harrison* not only violates the Court's clear statements in *Harvey* and *Moran*, it also contradicts the Court's statement in *McNeil* that the Sixth Amendment "cannot be invoked once for all future prosecutions, for it does not attach until a prosecution is commenced." 501 U.S., at 175. It should be elementary that the Sixth Amendment prophylaxis in *Jackson* cannot be "invoked" until the Sixth Amendment itself attaches. *See, e.g., Muick*, 167 F.3d, at 1165 ("*McNeil* forecloses the argument that the Sixth Amendment right to counsel may be invoked before indictment.").



representation by Ridley, both as a matter of the facts here and as a matter of law, did not "wrap a protective cloak around" him, nor did it "protect [Cobb] from the consequences of his own candor." *Id.*

### C. Alternatively, the Fifteen-Month Break in Custody Between Cobb's Burglary Arraignment and His Murder Confession Lifted the *Jackson* Bar.

The Court may resolve this case on the alternative basis that Cobb's lengthy break in custody between August 1994 and November 1995 dissolved the *Jackson* bar. The courts of appeals have addressed this issue as to *Edwards*, but not *Jackson*. The circuit courts agree that a break in custody that is reasonably sufficient to allow a defendant to seek the advice of counsel eliminates the need for the *Edwards* rule. *See United States v. Arrington*, 215 F.3d 855, 856-57 (CA8 2000) (citing *Holman v. Kemna*, 212 F.3d 413, 419 (CA8 2000)); *Kyger v. Carlton*, 146 F.3d 374, 380-81 (CA6 1998); *United States v. Bautista*, 145 F.2d 1140, 1150 (CA10 1998); *United States v. Barlow*, 41 F.3d 935, 945-46 (CA5 1994); *United States v. Hines*, 963 F.2d 255, 256-57 (CA9 1992) (citing *United States v. Skinner*, 667 F.2d 1306, 1309 (CA9 1982)); *Dunkins v. Thigpen*, 854 F.2d 394, 397 (CA11 1988); *McFadden v. Garraghty*, 820 F.2d 654, 661 (CA4 1987); *United States ex rel. Espinoza v. Fairman*, 813 F.2d 117, 125

& n.6 (CA7 1987), *overruled on other grounds by McNeil*, 501 U.S., at 177-82. The courts are unanimous on this issue. *See Kyger*, 146 F.3d, at 380. This Court itself has indicated in *dictum* that *Edwards* applies only "assuming there has been no break in custody." *McNeil*, 501 U.S., at 177; *see Bautista*, 145 F.3d, at 1150 (relying on *dictum* in *McNeil*).

The reasons for the break-in-custody exception to *Edwards* apply equally to *Jackson*. A break in custody dissolves the *Edwards* effect because "if custody is broken, especially for a lengthy period of time, the inherently coercive nature of custody itself is diminished and there is little to no risk of badgering by the authorities." *Bautista*, 145 F.3d, at 1150; *see also Kyger*, 146 F.3d, at 381 (*Edwards*'s concern with police coercion "simply is not implicated when a suspect is not in continuous custody"). *Jackson*, of course, bars police-initiated questioning in precisely the same setting as *Edwards*—custodial interrogation—and shares *Edwards*'s concern for preventing badgering of defendants who have previously invoked their right to counsel. *See Jackson*, 475 U.S., at 635. In short, the break in custody exception unanimously adopted by eight circuits should apply with equal force to *Jackson*.

Even assuming that Cobb sufficiently invoked *Jackson* by accepting appointed counsel at his burglary arraignment, Cobb was released on bond after the August 1994 arraignment and was not taken into police custody again until November 1995. During this fifteen-month break in custody, Cobb was free to consult with his appointed counsel. Pet., at B-5. This lengthy period should have been sufficient to lift any *Jackson* bar lowered at Cobb's arraignment. Thus, when the Odessa police arrested Cobb in November 1995, Cobb was not prevented by *Jackson* from unilaterally making a valid waiver of his right to counsel and confessing.



## CONCLUSION

The Court should reverse the decision of the Texas Court of Criminal Appeals.

Respectfully submitted,

JOHN CORNYN
Attorney General of Texas
ANDY TAYLOR
First Assistant Attorney General
GREGORY S. COLEMAN*
Solicitor General
S. KYLE DUNCAN
Assistant Solicitor General
P.O. Box 12548
Austin, Texas 78711-2548
(512) 936-1700

*Counsel of Record

*Counsel for Texas*

# APPENDIX

# APPENDIX

STATE DISTRICT COURT
WALKER COUNTY, TEXAS
12TH DISTRICT

---

Criminal Case No. 18,920

THE STATE OF TEXAS

v.

RAYMOND LEVI COBB

---

## DOCKET ENTRIES

| DATE | PROCEEDINGS |
|---|---|
| 1/4/96 | Record; Appearances - D. Weeks, Defendant (Δ), H. Ridley, B. Green; Hearing: Arraignment-waived reading of indictment, plea of not guilty; Δ found indigent-appointed H. Ridley lead counsel, B. Green co-counsel (1st Chair & 2nd Chair) |
| 12/18/96, 10:00 a.m. 6:20 p.m. | Record; Appeared-D. Weeks, J. Gaines, Defendant, H. Ridley, B. Green; Pretrial hearing: Δ's motion to suppress and motion to suppress Defendant's statement pursuant to *Jackson v. Denno*: pursuant to Δ's motion, per *Gannett Co., Inc., Petitioner, et al., v. De Pasquale, etc., et al.*, 99 S.Ct. 2898 (1979) and *Richmond Newspapers, Inc., etc., et al., Appellants* |

| DATE | PROCEEDINGS |
|---|---|
| | *et al., v. Commonwealth of Virginia, et al.*, 100 S.Ct. 2814 (1980), Court closed hearing on this motion to public including media and issued verbal gag order re: any at this hearing divulging contents of hearing; recessed after 3 witnesses/3 hours, balance of time involving other cases. |
| 12/19/96, 9:45 a.m. 6:00 p.m. | Record; same appearances; resumed hearing, evidence (at 9:55); evidence concluded at 4:30 p.m.; argument; motions denied; abeyed until trial ruling re knives removed from house of Δ by his father; findings/conclusions will be prepared. |
| | Outside jury's presence; rule of witnesses invoked; jury seated, sworn, instructed (with 2 alternatives); state presented indictment-Section 19.03 Capital Murder-Defendant's plea not guilty; opening statement by State; State's evidence began at 9:55 a.m.; recessed at 5:20 p.m. |
| 2/24/97, 9:10 a.m. 5:15 p.m. | Record; same appearances; resumed trial; State's evidence; State rested at 11:15 a.m.; recessed re jury; Defendant's motion for instructed verdict denied. |
| 2/25/97, 9:00 a.m. 5:15 p.m. | Record; same appearances; resumed trial; Defense rested; Court presented charge to jury; final arguments; jury retired to deliberate re verdict at 10:10 |



| DATE | PROCEEDINGS |
|---|---|
| | a.m.; at 11:15 a.m., jury returned verdict-Guilty, Capital Murder; jury presiding Juror Phillip Townsend; jury polled-unanimous verdict; verdict received, accepted. |
| 2/26/97 1:00 p.m. 5:20 p.m. | Record; same appearances; punishment phase of trial began. |
| 2/27/97 | At 2:10 p.m., jury returned verdict: Special Issue 1 answered "Yes", Special Issue 2 answered "No," jury polled-unanimous verdict; verdict received, accepted; jury instructed and released; Court pronounced death sentence; Court advised Defendant of post trial and appellate rights; Judgment rendered, entered, signed. |
| 10/28/97 | Signed Findings of Fact and Conclusions of Law. William L. McAdams; by DB. |

TEXAS COURT OF CRIMINAL APPEALS

---

Criminal Case No. 72,807

THE STATE OF TEXAS,
*Petitioner,*

v.

RAYMOND LEVI COBB,
*Respondent.*

---

## DOCKET ENTRIES

| DATE | PROCEEDINGS |
|---|---|
| 6/23/1999 | Case submitted |
| 3/15/2000 | Opinion issued (reversed and remanded). |
| 4/4/2000 | Motion for Stay of Mandate granted; 90-day extension from issuance of opinion. |
| 5/1/2000 | Petition for writ of certiorari to United States Supreme Court (filed 4/21/2000). |
| 6/9/2000 | Mandate stayed by United States Supreme Court (motion filed in USSC on 6/2/2000). |
| 7/3/2000 | Petition for writ of certiorari granted (limited to questions 1 & 2). |